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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

JOHNIE THROCKMORTON,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

No. 683

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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INDEX.

	Page
Petition for writ of certiorari	1-10
Opinion below	2
Basis of jurisdiction	2
Question presented	2
Summary statement	3
Reasons for granting the petition	5
Prayer for writ	10

Cases Cited.

Arrington v. Robertson, 114 F. 2d 821	5, 6, 7
Fillipon v. Albion Vein Slate Co., 250 U. S. 76, 63 L. Ed. 853	9, 10
Marron v. Atlantic Ref. Co., 176 Fed. 313	4
Parfet v. Kansas City Life Insurance Co., 128 F. 2d 361	5, 6, 7
Shields v. United States, 273 U. S. 583, 588, 71 L. Ed. 787	10
Sunderland v. United States, 19 F. 2d 212	8
Wheaton v. United States, 133 F. 2d 522	8

Statutes Cited.

Federal Employers' Liability Act, 45 U. S. C., Sec. 51 et seq.	3
Federal Rules of Civil Procedure, Rule 75 (h)	1, 2, 4
Federal Safety Appliance Act, 45 U. S. C., Sec. 11	3
Revised Judicial Code, Title 28, U. S. Code, Sec. 1254	2

Miscellaneous Cited.

16 Anno. Cases 1133	9
17 L. R. A. (N. S.) 609	9

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To the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Eighth Circuit on January 13, 1950, affirming a judgment rendered in respondent's favor by the United States District Court for the Eastern District of Missouri, and denying petitioner's motion filed under Rule 75 (h) of

the Federal Rules of Civil Procedure. Petitioner's action in the District Court was instituted under the Federal Employers' Liability Act.

OPINION BELOW.

The opinion of the Court of Appeals is printed in the record at page 327, and is reported in 179 F. 2d 165.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Title 28, U. S. Code, Section 1254 (the Revised Judicial Code). Application for stay of mandate pending application to this Court for writ of certiorari was made on January 28, 1950, and an order staying the mandate was entered on January 30, 1950 (R. 338).

QUESTION PRESENTED.

Is it reversible error for the trial judge to communicate with and instruct the jury ex parte during the jury's deliberations without notice to the parties or their counsel, and without opportunity for the parties or their counsel to object to such communication?

SUMMARY STATEMENT.

Petitioner, plaintiff in the District Court, instituted an action under the Federal Employers' Liability Act, 45 U. S. C., Section 51 et seq., to recover for injuries sustained by him as a switchman while in the employ of respondent and alleged to be due to a violation by respondent of the Federal Safety Appliance Act, 45 U. S. C., Section 11 (R. 1-3).

The jury returned a verdict in respondent's favor, judgment was entered thereon, petitioner's motion for a new trial was denied, and the cause was appealed by petitioner to the Court of Appeals (R. 316-318).

While the appeal was pending, and prior to its argument and submission, petitioner moved for an order: (1) continuing the argument and submission of the case; and (2) granting petitioner leave to present to the District Court a motion to correct and supplement the record on appeal and to certify and transmit to the Court of Appeals a supplemental record (R. 320).

In support of this motion petitioner submitted three affidavits, one from the foreman of the jury and two from members of the jury (R. 321-33). In his affidavit, which was fully supported by the other two affidavits, the foreman stated that, on the morning the verdict was rendered, he had brought to the jury room from his shop a magnifying glass wrapped in paper; that he had suggested to the other jurors that this glass be used to examine the photographic exhibits in the case in order to assist in a determination whether the appliance in question was defective; that, at the suggestion of the other jurors, the foreman addressed a note to the trial judge requesting permission for such examination; that the judge endorsed upon this

note the words "You may do so," and returned the note to the foreman; and that such examination was thereupon made by the jury in the jury room. These facts were not discovered by petitioner until the appeal had been docketed.

All this had occurred without notice to petitioner or his counsel, and without their knowledge; and was, therefore, completely ex parte. Petitioner's motion was filed pursuant to Rule 75 (h) of the Federal Rules of Civil Procedure. Marron v. Atlantic Ref. Co., 176 Fed. 313.

Action on this motion was postponed by the Court of Appeals until its action on the merits, and, following the opinion of the appellate court affirming the judgment of the trial court, the motion was denied and the judgment finally affirmed (R. 337). Subsequently, petitioner in order fully to protect his rights filed a motion in the trial court for relief under Rule 60, which motion was summarily denied; the denial was appealed, and the second appeal, now pending before the Court of Appeals, has been continued until this Court has acted upon petitioner's application for writ of certiorari.[1]

The Court of Appeals, in its opinion denying the motion and affirming the judgment of the trial court, assumed the facts set forth by counsel for petitioner as stated in the affidavits, and, on that assumption, stated, without reference to the authorities or supporting reasons, that the action of the trial judge was "not erroneous or prejudicial" (R. 336).

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1 The record in the second proceedings is filed as a supplement to the record in the original appeal.

REASONS FOR GRANTING THE PETITION.

1. The Court of Appeals has rendered a decision in conflict with the decisions of Courts of Appeals in other circuits upon the same matter.

The decision of the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in **Arrington v. Robertson,** 114 F. (2d) 821, and with the decision of the Court of Appeals for the Tenth Circuit in **Parfet v. Kansas City Life Insurance Co.,** 128 F. (2d) 361.

In the latter case, the question for the jury was whether the assured had died by suicide. After retiring for their deliberations, the jury handed to the bailiff a note, inquiring of the trial judge whether it was necessary that a motive be shown by the evidence for the jury to find that there was suicide. The trial judge directed the bailiff to tell the jury orally "No". Conceding that this communication was a correct statement of the law, the Court of Appeals reversed the judgment of the trial court, stating:

> "But where a case has been submitted to the jury and in the course of their deliberations the jury request additional instructions, such instruction should be given in the presence of the parties or their attorneys, or after notice and opportunity for them to be present. It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice or opportunity to be present, even though substantial prejudice is not affirmatively shown." 128 Fed. 2d at 362.

It is clear that this decision is in square conflict with that of the court below.

Indeed, the instant cause presents an even stronger case for granting the relief sought by petitioner in his motion. In the **Parfet** case it was conceded that the communication made by the trial court to the jury embodied a correct statement of the law. In the instant case, there is no possible method of determining the correctness of the jury's request or extent to which petitioner was prejudiced by the trial judge's action. It may be conceded that under certain circumstances it might have been proper for the jury to examine the exhibits with the aid of a magnifying glass. This assumes, however, that the glass was a good one, capable properly of reflecting to the jury the face of the exhibits. Petitioner or his counsel was entitled to examine the glass in order to ascertain whether its use was objectionable on this or some other ground. Furthermore, it may well have been the court's duty to admonish the jury as to the limited reliance which could be placed upon such a device; and petitioner was entitled to an opportunity to request the court to give such an admonition.

Such considerations give force to the rule which requires all proceedings to be had in the presence of the parties or their counsel. They indicate the possible prejudice which petitioner may have sustained as a result of the ex parte action of the trial judge. The **Parfet** case holds that no showing of prejudice is required. The instant case is a stronger one.

In the **Arrington** case, the trial court, pursuant to an inquiry from the jury, sent to it instructions in writing embodying two points in the charge which had already been given to the jury, though excepted to by appellants. To the contention that these instructions correctly applied the law of the case, the appellate court replied:

> "In our view, however, their accuracy as abstract statements of the law is immaterial." 114 F. 2d at 820.

The Court further stated, in reversing the judgment of the trial court:

> ". . . the parties are entitled to anticipate . . . that all such proceedings will take place in open court in the courtroom assigned for the trial and will be reported by the court stenographer." 114 F. 2d at 823.

Apropos of the argument relied on by the Court of Appeals in the instant case, Judge Maris stated on behalf of the court in the **Arrington** case:

> "The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present." 114 F. 2d at 823.

No squarer conflict between courts could be presented than that between the holding of the court below and that of the Tenth and Third Circuits in the two cases above cited. The only possible distinction which we can imagine is the contention that in the **Parfet** and **Arrington** cases the courts were dealing with instructions of law, whereas in the instant case the court below was dealing with only a request for permission to examine the exhibits in a particular way. Such a distinction has no basis. In the case at bar the Court, in effect, instructed the jury that it was authorized to do a particular thing. The principle of law is the same: that the parties have a legal right to know what transpires between judge and jury, and to present their objections in open court to the propriety of any communication between them; and this right cannot be drained

of its substance by post hoc speculations as to the prejudice which may have resulted from its violation.

2. The holding of the court below seems to conflict with that court's own decision in Wheaton v. United States, 133 F. 2d 522. In that case, while the jury was deliberating, a written message was delivered by the bailiff from the foreman of the jury to the trial judge, and it was claimed that the bailiff, after talking with the judge, made certain statements to the jury as to the manner in which the jury might or should consider the various counts in the indictment. On the other hand, the bailiff, though admitting the communication, asserted that he was merely conveying to the jury the trial judge's reiteration of instructions already repeatedly given the jury. The Court of Appeals nevertheless remanded the case for a fresh determination by the trial court on the basis of testimony rather than affidavits, whether the communications admittedly made were prejudicial, with the burden of proof on the appellee.

In the **Wheaton** case the Eighth Circuit, following its own prior holding in **Sunderland v. United States**, 19 F. 2d 212, adhered to the view that ex parte communications to the jury are presumed to be prejudicial but that this presumption is rebuttable; and that the proper procedure is to remand for a determination of prejudiciality vel non by the trial court with the burden of proof on the appellee. In so holding, the Eighth Circuit admitted a conflict between its decisions and those of other jurisdictions, including the Tenth Circuit.

In the instant case, the court below departed sub silentio from the **Wheaton** case and refused even to remand the issue for the taking of proof. In so doing, the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings so as to call for an

exercise of this court's power of supervision. This is an additional reason why the writ should issue.[1]

3. The court below has decided a federal question in a way probably in conflict with applicable decisions of this court, and more especially with the decision of this court in **Fillipon v. Albion Vein Slate Co.**, 250 U. S. 76, 63 L. Ed. 853.

In that case the jury had retired, and in response to a written request the trial court gave the jury a supplemental instruction in writing. His action in so doing was held by this court to constitute reversible error. The court, speaking through Mr. Justice Pitney, stated:

> "In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity to be present or to make timely objection to the instruction." 250 U. S. 81, 63 L. Ed. 856.

To the argument, identical with that offered by the court below in the instant case, that such conduct was not reversible error unless the instruction was erroneous or prejudicial, the court said:

> "It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling of convinced of error." 250 U. S. at 82, 63 L. Ed. at 856.

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1 Decisions of many State Courts to the same effect are collected in 17 L. R. A. (N. S.) 609 and 16 Anno. Cases 1133.

Though the court went on to hold that in fact the instruction given in the **Fillipon** case was erroneous, the manner of its giving was in itself held to be reversible error. See **Shields v. United States**, 273 U. S. 583, 588, 71 L. Ed. 787, where the holding of the **Fillipon** case was authoritatively construed on this court's behalf by Chief Justice Taft.

The decision of the court below cannot be reconciled with the holding of this court in the **Fillipon** case. Even if one accepts the view that such error is only rebuttably presumed, the court below was wrong, since on that view the case should have been remanded to the trial court for a determination of prejudiciality.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Eighth Circuit should be granted.

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